

Chief Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 HENRY CARL ROSENAU,)
)
 Defendant.)

NO. CR06-157MJP

RESPONSE TO MOTION FOR
RELEASE PENDING RETRIAL

Noted: June 1, 2012

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Susan M. Roe and Marc A. Perez, Assistant United States Attorneys for said District, files this response to the defendant's Motion for Release pending his retrial. The trial will begin on July 11, 2012.

STATUS

The defendant first appeared in this District on April 28, 2011, after his extradition from Canada. On May 4, 2011, in spite of the presumption for detention and his foreign residency, Mr. Rosenau was released to his home in Quesnel, British Columbia, in accordance with the PreTrial Services recommendation. On July 21, 2011, he admitted a violation of his PreTrial Release, that is, he was residing in a home with a medical marijuana grow. The grow apparently was the bailiwick of his longtime significant other, Veronica

1 Shwartz.¹ The Court ordered Mr. Rosenau to change residences or to uproot the marijuana
2 grow. It is unknown whether either was done.

3 On October 28, 2011, Mr. Rosenau was found to have committed a second violation,
4 that is, that he had contact with at least one witness in violation of the terms of his release.
5 The contact was based on his filing and litigating a lawsuit, *Rosenau v. Whelpley*, against a
6 significant government witness, and on then-new contact between Rosenau's "agent" and
7 Mr. Whelpley. The contact was made to "remind" the witness that he should not testify in
8 the upcoming trial.

9 At the hearing, PreTrial Services Officer Julie Busic testified that Mr. Rosenau
10 previously denied recognizing the names on the government's witness list although, in fact,
11 he had already sued Mr. Whelpley. Magistrate Judge Tsuchida revoked the defendant's
12 pretrial release.

13 Mr. Rosenau appealed the revocation to the District Court and cited as one basis for
14 release that his "significant other, Veronica Shwartz," was "dying from Stage 4 Cervical
15 Cancer, and relies on Mr. Rosenau for assistance and support." Dkt 60, page 4, line 29-31.
16 The government opposed the motion, and incorporates the facts and law set out in its
17 response, Dkt #63, in this pleading.

18 On November 9, 2011, the District Court considered the motion, heard argument of
19 counsel and found, when considering the issue of detention *de novo*, the defendant had not
20 overcome the presumption of detention based on the nature of the offense and the serious risk
21 of his flight in light of his lack of any connections to the District and to the United States and
22 in light of his residence in a foreign country, especially his home which was located several
23 hours away from the international border and in a location beyond that which is supervisable
24 by PreTrial Officers at or near the border. Additionally, the District Court specifically

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27 ¹ Although not referenced in the current motion, last year the defendant reported
28 Ms. Shwartz was his partner of nine years duration in the PreTrial Services interview, follow-up
discussions, and was asserted in the Violation Hearings. She remains in frequent telephone
contact with the defendant while he is at FDC, although she did not attend trial.

1 affirmed the basis for revocation as set out in the Magistrate Judge's decision. Dkt # 65
2 and 66. The defendant has remained in custody.

3 Mr. Rosenau asks that the detention issue be reopened and that the Court release him
4 pending retrial in six weeks. Although not specified in the Motion, Dkt # 156, it appears that
5 the defendant wishes to return to Canada if released. He asks for release based on (1) needs
6 of his family in Canada and (2) the implication that a hung jury² undermines the strength of
7 the criminal case. Neither is an appropriate basis in law.

8 ***LAW***

9 Title 18, United States Code, Section 3142, addresses Release or Detention of a
10 Defendant Pending Trial and subsection 3142(f) concludes with the legal basis for reopening
11 the detention issue:

12 The hearing may be reopened ... if the judicial officer finds that information
13 exists that was not known to the movant at the time of the hearing and that has
14 a material bearing on the issue whether there are conditions of release that will
15 reasonably assure the appearance of such person as required and the safety of
16 any other person and the community.

16 There is no new information before the Court material to the facts underlying the prior
17 Court order of detention. In October the Magistrate Judge determined and, in November, this
18 Court determined that there were no conditions which would reasonably assure (1) the
19 defendant's appearance as required and (2) the safety of other persons and the community.
20 Nothing has changed which might modify these findings.

21 The Court, however, does have some additional information which directly addresses
22 the credibility of the defendant. On April 25, 2012, in response to the Court's questions,
23 Mr. Rosenau said he did not authorize anyone to sue the Assistant United States Attorney
24 (AUSA) and that he did not intend to stop or hinder the trial. *Attachment 1*, Transcript of
25 April 25; page 9, lines 11 - 14; page 10, line 13 - page 11, line 4. However, in recorded
26 phone calls to Paddy Roberts and Judi Rosenau, beginning on April 22, Mr. Rosenau

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28 ² Two jurors called the AUSAs. Each reported the jury was split 11 to 1 to convict.

1 reaffirmed to Mr. Roberts that Mr. Roberts had his electronic signature to use, discussed the
 2 lawsuit against the AUSA ("sue Sue"), and discussed that the lawsuit would stop the trial.
 3 *Attachment 2*, FDC calls. Of great concern here is that it appears that Mr. Rosenau, working
 4 with Mr. Roberts and others, did try to thwart his trial and then that he was less than candid
 5 with the Court when directly asked about it.

6 ***CONCLUSION***

7 There is no adequate legal basis for reopening the detention issue. There is no new
 8 information before the Court that either overcomes the presumption of detention or reassures
 9 the Court that the defendant would appear as required and that others in the community
 10 would be free from harassment. The defendant should remain detained.

11 DATED this 29th day of May, 2012.

12 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney of record for the defendant.

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